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# LIBERALISM, SOCIAL DEMOCRACY AND THE VALUE OF PROPERTY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

## I. INTRODUCTION

In most of Europe, expropriation must comply with the standards set under European human rights law. Article 1 of the First Protocol ('P1-1') to the European Convention on Human Rights declares that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions.' The European Court of Human Rights has stated that the right would be 'largely illusory and ineffective' if it did not guarantee full compensation in all but exceptional circumstances.<sup>1</sup> It is quite clear, however, that this was not the belief of at least some of the States that had signed it when it came into force in 1954. P1-1 makes no reference to compensation. An interference must be lawful, and in the public or general interest, but there is nothing that expressly requires compensation. Nevertheless, the Court has declared that any interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights',<sup>2</sup> and this means that expropriation without compensation that is reasonably related to the value of the property would normally violate the owner's rights under P1-1.<sup>3</sup>

This article asks the question: how did the Court arrive at an interpretation that is clearly at odds with the original expectations of some signatories? Compensation was one of the most fiercely contested aspects of the right to property, and indeed of all Convention rights. The absence of a reference to a guarantee of compensation was not an oversight: it was certainly not regarded as a necessary element of the right to property that was too obvious to require mention. Nothing was said because, in effect, the States agreed to disagree about compensation, and silence expressed that agreement perfectly. The original text represented a compromise between liberal and social democrat visions of property and human rights, and that compromise could only be reached by leaving out any reference to compensation. However, the Court has not been entirely comfortable with that compromise, and it has steadily moved to a liberal construction of P1-1. It has never explained why it has done so, except in brief assertions about illusory and ineffective rights. It has not claimed, for example, that this position is a result of evolutive or dynamic interpretation. The judgments do not assert that a new consensus in favour of compensation emerged at some point after P1-1 came into force, or that changing social and economic conditions made earlier interpretations of P1-1 untenable. Indeed, it sometimes appears that the Court is often unaware that there are alternative, social democrat readings of P1-1 that might inform the jurisprudence.

<sup>1</sup> *James v United Kingdom* (App No 8793/79) (1986) Series A No 98 [54]; *Lithgow v United Kingdom* (App No 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81) (1986) Series A No 102 [120].

<sup>2</sup> *Sporrong and Lönnroth v Sweden* (App No 7151/75; 7152/75) (1982) Series A No 52 [69].

<sup>3</sup> *James* (n 1) [36]; *Lithgow* (n 1) [50]–[51].

The article begins by examining the liberal and social democrat views on property and human rights, their relationship with compensation and expropriation, and how they were reflected in the debates on the right to property and its final text. It then examines the source of the compensation principle in a seminal trilogy of cases of the 1980s: *Sporrong and Lönnroth v Sweden*,<sup>4</sup> *Lithgow v United Kingdom*<sup>5</sup> and *James v United Kingdom*.<sup>6</sup> It explains that, although these cases represent a movement to the liberal version of the right to property, there were still strong elements of social democrat thinking. It then goes on to demonstrate that the subsequent jurisprudence, especially that of the last five years or so, has moved even further away from the social democrat position. Increasingly, the free market represents the norm for judging all State action affecting property, and the Court cannot even conceptualize an alternative perspective on the right to property.

## II. COMPETING VISIONS OF THE RIGHT TO PROPERTY

### A. The Liberal Right to Property

The liberal view of human rights and democracy concentrates on the protection of individual liberty from the State.<sup>7</sup> It regards expropriation and regulation as interferences in a natural or normal state of affairs, in which property owners are free to use and dispose of their property as they see fit, subject only to narrow restrictions on actions that harm others. Property has a 'true' or 'real' value, which is determined by reference to transactions on an unregulated market. There are, of course, legitimate areas for State control: for example, a good constitutional order would include a legal system that allows owners to vindicate their property rights in a timely and effective manner. However, as a general principle, liberal governments would leave decisions regarding the use and disposition of property to the owners. State action regarding private property is seen as an interference with liberty, and as such it requires justification. Hence, expropriation can be justified only if, to the fullest extent possible, it leaves the owner no worse off than he or she would have been under an ordinary consensual transaction with other private persons. In other words, expropriation should be conditional on payment of market value compensation.<sup>8</sup>

It is this view that seems to lie behind the use of the market value as the standard for compensation under P1-1. It sees the relationship between owners of private property and the State as one of opposition. Their interests must be balanced against each other, and that balance can only be struck if the owner receives market value compensation on expropriation.<sup>9</sup> Moreover, the protection of property is not a necessary outcome of

<sup>4</sup> *Sporrong* (n 2).

<sup>5</sup> *Lithgow* (n 1).

<sup>6</sup> *James* (n 1).

<sup>7</sup> For a modern expression of liberal property theory, see RA Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge, USA 1985); cf TC Grey 'The Malthusian Constitution' (1986) 41 U Miami LR 21.

<sup>8</sup> Arguably, subjective values should be taken into account as well: see T Allen, 'Compensation for Property under the European Convention on Human Rights' (2007) 28 Michigan JIL 287.

<sup>9</sup> The balance need not be struck by the judicial branch: in other words, a constitution may frame a property right in terms that leave the judiciary with no clear power to balance interests. Nevertheless, the balance has still been struck, but by the drafters of the constitution.

securing democracy. Democracy might exist without property, and democracy can represent a threat to property.

The converse argument—that the protection of property is necessary for democracy, or at least that it makes democratic institutions more effective—has been made by some liberals. As Carol Rose has put it, ‘the classical political brief for property stated that private property supports democracy and liberty.’<sup>10</sup> Individuals need the assurance of a minimum level of personal and economic security before they can be persuaded to engage in the democratic process at all, and the institution of private property helps to provide that sense of security. A similar argument, but more directly related to compensation and value, considers the accountability of elected representatives to the electorate. In *Pennell v San Jose*, Justice Scalia of the Supreme Court of the United States maintained that:

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved ‘off budget’ with relative invisibility and thus relative immunity from normal democratic processes.<sup>11</sup>

For example, many States seek to protect tenants from rent increases by imposing rent controls on landlords, but they could protect tenants just as easily by providing them with direct monetary grants to cover rent. This, of course, would require the legislature to raise taxes. As more taxpayers are affected, it would become more likely that the merits and costs of taking and regulating property would feature in political debate. Hence, Justice Scalia felt that a rule of full compensation has the ‘happy effect’ of ‘fostering of an intelligent democratic process’.<sup>12</sup>

In Europe, the debate on P1-1 did not examine the relationship between property, human rights and democracy to this depth. In the early Consultative Assembly debates on proposals for a human rights treaty, Lord Layton, an influential British member of the Assembly, argued that the proposed treaty ‘should be limited to the absolute minimum necessary to constitute the cardinal principles for the functioning of political democracy’, and hence it should not include a right to property.<sup>13</sup> He grouped the right to property with other social and economic rights: they were certainly important, but the protection of these rights could wait until democracy was secured.<sup>14</sup> None of the other members of the Assembly addressed his argument directly. This is not particularly surprising, as there was no clear idea of the relationship between human rights and democracy generally. The Preamble to the Statute of the Council of Europe states that ‘individual freedom, political liberty and the rule of law’ are ‘principles which form the basis of all genuine democracy’.<sup>15</sup> The Preamble to the Convention on Human Rights declares that ‘effective political democracy’ and ‘a common understanding and observance of the human rights’ are the basis for maintaining the fundamental freedoms laid down in the Universal Declaration of Human Rights. Neither treaty

<sup>10</sup> CM Rose, ‘Privatization—The Road to Democracy?’ (2006) 50 Saint Louis Uni LJ 691, 700–701. <sup>11</sup> 485 US 1, 22–23 (1988). <sup>12</sup> *ibid.*

<sup>13</sup> Council of Europe, *Collected edition of the ‘travaux préparatoires’ of the European Convention on Human Rights: Recueil des travaux préparatoires de la Convention européenne des droits de l’homme* (M Nijhoff, The Hague, 1975–1985) vol 2, 52.

<sup>14</sup> *ibid* 54–56; see also 80 (Elmgren, Sweden).

<sup>15</sup> Art 3 also declares that states that subsequently wished to join the Council of Europe would be expected to accept ‘the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’.

makes it clear whether democracy and human rights stand independently of each other, or in mutual support, or in opposition. Democracy seems to be both an outcome of protecting human rights, and a precondition for protection.

It is therefore not too surprising that those who supported a right to property, with a strong compensation guarantee, did not claim that it would enhance democratic governance. They felt that even a democratic government could represent a threat to property, and that there was a conflict between public and private interests in property. The protection for property could not be absolute, but neither could it be cast aside at the whim of governments; some balance must be struck, and the only fair balance would be that which most closely reproduced the conditions of a consensual private transaction. The ideal form of a right to property would include an express guarantee of market value compensation.

### *B. The Social Democrat Right to Property*

In the post-World War II period, in Western Europe, the social democrat view of a human right to property presented an important alternative to the liberal view.<sup>16</sup> For social democrats, human rights were not solely about individual autonomy and limitations on State power. Human rights included claims to the basic goods needed to live a meaningful life. Hence, a complete charter of human rights would include positive obligations to housing, education, health care, and the like. Finding a way to implement these obligations in enforceable legal instruments would be difficult, but it did not mean that these obligations did not exist. The social democrat vision also saw the regulation of property in a fundamentally different light. For social democrats, the pre-War experience demonstrated that a failure to control capitalism and the free market could produce economic cycles that left basic needs unsatisfied. Regulation would moderate the cycles of the unregulated economy and help to ensure that human rights received respect. Hence, the regulation of property is therefore not a primary threat to human rights: it is the failure to regulate that is the greater threat. For social democrats, regulation is not an interference with a natural or normal state of affairs; regulation *is* the normal state of affairs in a nation that respects human rights.

This had several implications. To begin with, for liberals, compensation was described in terms of corrective justice, where expropriation is seen as a form of injury which must be corrected by compensation. The classic statement is William Blackstone's, who asserted that, although the legislature may compel the individual to give up property, it can only do so 'by giving him a full indemnification and equivalent for the injury thereby sustained.'<sup>17</sup> In social democrat thinking, compensation was more often seen in terms of distributive justice, comparable in purpose and effect to other forms of social insurance or welfare. Questions surrounding compensation for property were not categorically different than the questions about State support for the unemployed, public health care, or for ailing industries during periods of economic crisis. The choice of an appropriate compensation standard therefore depends on the

<sup>16</sup> S Berman, *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century* (CUP, New York, 2006); J Callaghan, *The Retreat of Social Democracy* (Manchester University Press, Manchester, 2000) 1–25.

<sup>17</sup> W Blackstone, *Commentaries on the Laws of England I* (Oxford, Clarendon Press, 1765) 135.

relationship of the duty to satisfy basic human needs through public projects (for which property may be required), and the risk and the impact on investor behaviour that the compensation standard may have. It may be the case, for example, that full market value compensation may deter local governments from undertaking socially valuable programmes. Conversely, the risk of uncompensated expropriation may drive private capital to other jurisdictions, or into economic sectors that are relatively unproductive but where assets are less likely to be expropriated. In relation to human rights, the policy makers would focus on the impact of a given compensation standard on the likelihood of satisfying basic human needs, both of the property owners and anyone else who may be affected by its compensation policy. This analysis is not a simple one: indeed, Frank I Michelman argues that a regime that never compensates for takings of property would run the risk of demoralising its citizens, and the consequent loss of investment would offset any gains from the 'free' acquisition of property. By contrast, Blume and Rubinfeld argue that economic efficiency is furthered by denying compensation to property owners who are able to self-insure against the political risk of expropriation.<sup>18</sup> The point is that insurance is not a form of restitution or recompense for a wrong, and payments for expropriation are not intended to restore the 'victim' to a prior position, but that the State must consider issues over compensation as part of general issues of the management of the economy. For social democrats, the difficulty with the fixed standard of liberal theory is that it transfers these questions of economic management from the legislature to the courts.

The social democrats also challenged the liberal notion that there is a 'real' (ie market) value of property that exists in the absence of regulation. Indeed, in practical terms, it could be impossible to identify a prior, unregulated state of affairs. One well-known British example concerned the post-war nationalization of the railways.<sup>19</sup> At various times, there were suggestions the valuation for the shares in the railways should be based on asset values, or recent or projected profits, or on 'reasonable net maintainable revenue'. Even those who supported a single standard differed on its application. For example, those who argued for compensation to be based on profits differed over the relevant period: was the best indication of the value of a company its profit figures for the pre-war period (which had been poor), or during the war (which were stronger), or those projected for the future (very poor, and possibly nil, at least without State support of one form or another)? The problem was that there was no unregulated state of affairs in the railway industry that might have provided a standard. Ultimately, the companies were nationalized on the basis of share prices quoted on the London Stock Exchange. Even so, there were arguments that the quoted prices did not yield an accurate valuation, especially after the 1945 election, because they depended

<sup>18</sup> FI Michelman 'Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law' (1967) 80 Harvard LR 1165; L Blume and D Rubinfeld 'Compensation for Takings: An Economic Analysis' (1984) 72 Calif LR 569.

<sup>19</sup> G Crompton 'A very poor bag of assets': the railway compensation issue 1921–47' (1996) 6 Accounting, Business and Financial History 73. On the development of economic and nationalization policies in post-War Britain, see T Jones 'Labour Revisionism and Public Ownership, 1951–63' (1991) 5 Contemporary British History 432; S Brooke 'Revisionists and Fundamentalists: The Labour Party and Economic Policy during the Second World War' (1989) 32 The Historical Journal 157.

as much on speculation on the ultimate policy on compensation as it did on anything else.<sup>20</sup>

The picture was equally complex in relation to land.<sup>21</sup> During the war, the need to reconstruct bombed-out town centres brought attention to bear on compensation and planning. It was assumed that local authorities would need to take the lead in large-scale reconstruction, and that would involve the purchase of property in damaged areas. However, the extent of damage and the decline in income from the rates left many authorities without the funds that would have been required to compensate at full market value and still carry out reconstruction. But, going beyond the question of affordability, a number of factors cast doubt on the suitability of market values as the yardstick for compensation. To begin with, social democrats generally subscribed to the belief that much of the value of land was produced by social or community action, rather than individual effort.<sup>22</sup> For example, improvements in infrastructure can increase economic growth and, in particular, the demand for land or other types of property. Accordingly, there were various proposals for recouping this value, such as the nationalization of land or taxation of land values. It also followed that, even in the absence of wholesale nationalization, social democrats doubted that compensation for the acquisition of land for a public use should include payment for value created by the community.

The war raised other, more specific concerns. In particular, there was a widespread conviction that speculators should not profit unfairly from the war or from reconstruction. There was a general belief that the market in land had been driven at least partly by speculation, especially in areas that were heavily damaged by bombing, and that the speculation itself was driven by a belief that public authorities would offer generous compensation or other support as part of reconstruction. Speculation, it was believed, should not be rewarded by full compensation. In any case, there was a feeling that land owners should not benefit from increases in the value of land arising from the investment of central or local authorities in reconstruction (except, of course, to the extent that everyone shared in the benefits of reconstruction). Accordingly, the influential cross-party Uthwatt Committee on Compensation and Betterment recommended that the standard for compensation should be set at the market values that stood in 1939.<sup>23</sup> However, this did not resolve the controversy, as property values had dropped in some areas and risen in others. Not surprisingly, Labour members of the Coalition government argued that 1939 values should be the ceiling for compensation, and Conservative members saw them as the floor. But behind this controversy lay an important point of agreement: current market values did not provide an appropriate standard for compensation in many cases.

The Uthwatt Report also highlighted other doubts over the source of value and the relevance of the market in a regulated economy. Where the use of land is subject to development plans, speculation over the possibility of a grant of permission to change the use of land can drive market prices over the actual value of a change of use. That is,

<sup>20</sup> See Crompton *ibid* 87.

<sup>21</sup> See M Tichelar 'The Conflict over Property Rights in the Second World War: The Labour Party's Abandonment of Land Nationalization' (2003) 14 *Twentieth Century British History* 165; AW Cox, *Adversary Politics and Land: The Conflict over Land and Property Rights in Post-war Britain* (Cambridge, 1984) 40–50.

<sup>22</sup> Cox *ibid* 27–28.

<sup>23</sup> Uthwatt Committee on Compensation and Betterment, *Final Report* (Cmd 6386, 1942).

in the area covered the plan, the value of permission to develop land ‘floats’ over the planning area until it settles on a specific plot. Economists had observed that the aggregate floating value of development often exceeded the value of the development itself, once it had settled on a specific plot.<sup>24</sup> Speculation on the outcome of planning, and indeed on many other types of governmental decisions, appeared to distort market values. Once again, the market seemed to be an unreliable indicator of value.

Many of the principles of the Uthwatt Report were carried through to the Town and Country Planning Act 1947.<sup>25</sup> The Act nationalized the right to develop land, by making a change of use unlawful without planning permission. The Act, taken as a whole, was intended to ensure that the public reaped the value of planning and development. The Act allowed for compensation for the loss of the right to develop, but equally it imposed charges to capture the increase in value arising solely from the grant of permission. Compensation for acquisition was based on existing use values as they stood when the Act came into force. This excluded the potential for a grant of permission for a change of use, even if that potential was reflected in market prices. In effect, the value of development belonged to the State.

The focus on existing use was also intended to iron out the fluctuations in the market for land. There was no direct control over the prices paid in private transactions, but the limitations on compensation in compulsory acquisition would, it was thought, impose some restraint on private speculation. As such, it would help to avoid the economic cycles of capitalism that were thought to undermine political stability. Again, the emphasis is on the relationship between compensation and economic management.

The system created by 1947 Act proved unworkable in many respects. The Town and Country Planning Act 1959 put the emphasis back on market values. Compensation still remains a subject of litigation and official review, especially in relation to two key aspects of social democrat views on land and expropriation: whether the owner should receive compensation for value created by a development scheme or for value created by the potential for a grant of planning permission.<sup>26</sup> However, the central point is that the United Kingdom government certainly did not accept any notion that land owners had a moral or legal expectation of full market value compensation. The rejection of market values was not a rash decision, or based on short-term political or financial expediency. It was a principled approach to serious social and economic issues.<sup>27</sup>

<sup>24</sup> For a contemporary analysis, see A Robinson, ‘The Scott and Uthwatt Reports on Land Utilisation’ (1943) 53 *The Economic Journal* 28, 34. AS Fogg, ‘Development Value and the Law: The United Kingdom and Australian Experience’ (1978) 27 *ICLQ* 794, 798 compares it to a lottery, as the aggregate amount paid for tickets can far exceed the prize money.

<sup>25</sup> KC Clark, ‘The British Labor Government’s Town and Country Planning Act: A Study in Conflicting Liberalisms’ (1951) 66 *Political Science Quarterly* 87; M Grant, ‘Compensation and Betterment’ in B Cullingworth (ed), *British Planning: 50 Years of Planning and Regional Policy* (Athlone Press, London, 1999).

<sup>26</sup> *Waters v Welsh Development Agency* [2004] UKHL 19; *Spirerose Ltd v Transport for London* [2009] UKHL 44; Law Commission of England and Wales, *Towards a Compulsory Purchase Code*: (1) Compensation (Law Com No 286, 2003) (for a review of the history, see 151–221).

<sup>27</sup> See AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, OUP 2001) ch 15.



The United Kingdom's position was not unique. Other European constitutions drafted around that time contained a strong social democrat orientation.<sup>28</sup> For example, the Italian Constitution of 1948 protects property, but this protection sits alongside classic social democrat rights concerning work<sup>29</sup> and health, education and welfare.<sup>30</sup> The right to property provides that ownership is subject to the 'social function' of property, the 'state's right to heritage' and the need to impose obligations intended to serve the 'purpose of ensuring rational utilization of land and establishing equitable social relations'.<sup>31</sup> It also states that 'Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest'.<sup>32</sup> There was a guarantee of compensation, but it was not a guarantee of market value. Indeed, in 1980, the Constitutional Court stated that compensation must not be at a 'negligible or merely symbolic level but must constitute serious relief'.<sup>33</sup> Crucially, it said that 'serious relief' should not be equated with the market value of the property.<sup>34</sup>

The Irish Constitution of 1937 also reflected both liberal and social democrat positions. Article 43 states that 'man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods'.<sup>35</sup> This reflects a liberal focus, but article 43 also provides that the exercise of the right to property 'ought, in civil society, to be regulated by the principles of social justice' and may be delimited 'with a view to reconciling their exercise with the exigencies of the common good.' There was no specific guarantee of compensation, or indeed of market value compensation, and the courts have not found one by implication. This proved influential in subsequent policy debates: for example, in 1973, the Committee on the Price of Building Land reviewed the case law and stated that 'The alleged right of landowners to get the full market price for something in limited supply (a right which we believe does not exist) is not consistent with the common good'.<sup>36</sup> The Committee specifically recommended that local authorities should have the power to compulsorily acquire land in designated areas at existing use value, with an additional 25 per cent.<sup>37</sup> In 2004, the All-Party Oireachtas Committee on the Constitution stated that the 1973 conclusions were still valid.<sup>38</sup>

<sup>28</sup> Berman (n 16) 177–199.

<sup>29</sup> Art 36.

<sup>30</sup> Art 38.

<sup>31</sup> Art 42; see also art 44(1) ('For the purpose of ensuring rational utilization of land and establishing equitable social relations, the law imposes obligations on and limitations to private ownership of land, defines its limits depending on the regions and the various agricultural areas, encourages and imposes land cultivation, transformation of large estates, and the reorganization of productive units; it assists small and medium sized farms.')

<sup>32</sup> Art 43.  
<sup>33</sup> Judgment No 5 of 1980, as quoted in Judgment No 348 of 2007 [5.1] (the translation is from the official website, at [www.cortecostituzionale.it/versioni\\_in\\_lingua/eng/attivitaacorte/pronunceemassime/recent\\_judgments\\_2007.asp](http://www.cortecostituzionale.it/versioni_in_lingua/eng/attivitaacorte/pronunceemassime/recent_judgments_2007.asp)).

<sup>34</sup> O Pollicino, 'Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007' (2008) 4 European Constitutional LR 363.

<sup>35</sup> JM Kelly, *The Irish Constitution* (Butterworths, London, 1994) 1061–1091.

<sup>36</sup> *Report of the Committee on the Price of Building Land* (Prl. 3632, 1973) 47.

<sup>37</sup> *ibid* 45; cf Kelly (n 35) 1085–86, who notes that the recommendation was not implemented.

<sup>38</sup> The All-Party Oireachtas Committee on the Constitution, *Ninth progress report: private property* (Dublin: Stationery Office, 2004) 39; see also *Dreher v Irish Land Commission* [1984] ILRM 94; *O'Callaghan v The Commissioners of Public Works* (1995) ILRM 364.

Finally, article 14 of the Basic Law of the Federal Republic of Germany provided that

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

Article 14 embodies the German constitutional model of Sozialstaat and Rechtsstaat.<sup>39</sup> That is, the State has responsibility for the welfare of all its citizens, including subsistence and a just distribution of wealth, but the State remains limited by law and can only act through law. In the usual case, the 'equitable balance' of article 14(3) requires market value compensation. However, departures may be justified in special circumstances:

An inflexible compensatory amount, which is related to the market value alone, is consequently foreign to the Basic Law. It is also not correct that the person deprived of property always 'must be given a full equivalent for what has been taken' by the compensatory amount. The legislator can provide for full compensation or a compensatory amount less than that, according to the circumstances.<sup>40</sup>

It should therefore be clear that social democratic views on property and compensation were of at least some influence in Europe when P1-1 was debated. Liberalism was certainly not dead, but it was counter-balanced by the social democrat view. It is therefore not surprising that rise of social democracy had an impact on the drafting of the Convention. This compromise is evident from the debate on the first proposal for a right to property, which provided as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. Such possessions cannot be subjected to arbitrary confiscation. The present measures shall not however be considered as infringing, in any way, the right of a State to pass necessary legislation to ensure that the said possessions are utilised in accordance with the general interest.<sup>41</sup>

In the Consultative Assembly, it was said that the proposal was intended to 'make the distinction between arbitrary confiscation and the social conception of property which allows it to be used by regular legislation for the public good.'<sup>42</sup> Taken as a whole, it seems to offer little more than a symbolic nod to liberalism, as it leaves the legislature with virtually unlimited discretion over expropriation and regulation. Even so, it was rejected, as some governments believed that the prohibition on 'arbitrary confiscation'

<sup>39</sup> GS Alexander 'Property as a Fundamental Constitutional Right? The German Example' (2003) 88 Cornell LR 733; AJ Van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Cape Town, Juta, 1999) 121–63.

<sup>40</sup> BVerfGE 24, 367, 421 (1968) ('Hamburg Flood Control Case'), in R Youngs (trans), *English, French And German Comparative Law* (Routledge-Cavendish, London, 1998) 24.

<sup>41</sup> Council of Europe (n 13) vol 6, 6–10; see also vol 6, 52ff, 130–140.

<sup>42</sup> *ibid* vol 6, 48, 54 and 60.

amounted to a requirement to compensate for nationalization of property.<sup>43</sup> Not surprisingly, subsequent proposals for a guarantee of 'compensation',<sup>44</sup> 'fair compensation which shall be fixed in advance',<sup>45</sup> or 'such compensation as shall be determined in accordance with the conditions provided for by law'<sup>46</sup> were also rejected. The present version of P1-1 was accepted only because it does not refer to compensation: everyone is entitled to the 'peaceful enjoyment of his possessions', and 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'<sup>47</sup>

The proposal was also challenged by those who feared that it would not leave the State with a free hand to regulate property. That this was a concern may be surprising, especially in light of its reference to 'the right of a State to pass necessary legislation . . .'. Nevertheless, for some governments, it still went too far. The final version makes it clear that the State would judge the necessity of regulatory laws, as it states that 'The preceding provisions [of P1-1] shall not, however, in any way impair the right of a State to enforce such laws *as it deems necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'<sup>48</sup>

The result marked an uneasy and largely unarticulated compromise between liberalism and social democracy. At first glance, one might argue that P1-1 is a social democrat right to property: property may deserve protection, but in the same way that rights to housing or health care deserve protection. That is, it falls to the legislature to determine extent of provision and entitlement, in the light of the State's obligations to secure basic goods for everyone. However, this does not necessarily mean that questions of entitlement can be entirely trusted to the legislature or executive. In matters affecting property, as with other social rights, individuals should have enforceable rights to a lawful process, and a guarantee that entitlements are provided and administered without discrimination. Arguably, this is exactly what P1-1 does, and no more: it guarantees a lawful process, and, in conjunction with article 14, it prohibits discrimination in matters regarding expropriation and regulation. Nevertheless, the liberal element is still present. It is property that is included in the Convention rights, and not housing, health, or other social rights.<sup>49</sup> Article 8, for example, does not recognize a right to demand housing from the State, but only to respect for an existing home. In addition, P1-1 conceives of property regulation as an interference

<sup>43</sup> *ibid* vol 7, 208.

<sup>45</sup> *ibid* vol 7, 194.

<sup>47</sup> The reference to 'general principles of international law' is concerned with the customary rule requiring a State to compensate aliens for the expropriation of their property. See HR Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for 'Regulatory Expropriations' of the Property of Foreign Investors' (2002) 11 New York University Environmental LJ 148. It has been argued that P1-1 should be interpreted so as to extend the obligation to non-nationals to a State's own nationals, but the Court rejected this argument in *Lithgow* (n 1) [111]–[119]; E Schwelb, 'The Protection of the Right to Property of Nationals under the First Protocol to the European Convention on Human Rights' (1964) 13 American J Comparative L 518.

<sup>49</sup> Art 2 of the First Protocol does provide a right to education, but it is stated in negative terms ('No person shall be denied the right to education.'). As such, it is more concerned with discrimination and with parental choice than minimum standards regarding the quality or availability of education.

<sup>44</sup> *ibid* vol 7, 206–208.

<sup>46</sup> *ibid* vol 7, 222–24, 230.

<sup>48</sup> *Emphasis added.*

with individual entitlement; the entitlement exists prior to any human rights law, rather than being constituted by State response to basic needs.

### III. THE FAIR BALANCE AND COMPENSATION

The first close examination of the substantive content of P1-1 came in *Handyside v United Kingdom*,<sup>50</sup> which dealt with the confiscation of property judged to be obscene. The Court regarded the confiscation as a measure for controlling the use of property, and hence it fell under the third sentence of P1-1. Nevertheless, the case is significant because the Court stated that the third sentence of P1-1

sets the Contracting States up as sole judges of the 'necessity' for an interference. Consequently, the Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question.<sup>51</sup>

It appears that there is no room for a proportionality or fair balance test. The Court only required the United Kingdom to show that the confiscation was lawful, rationally connected to the stated aim of the legislation, and not discriminatory.<sup>52</sup> There was no further requirement that it satisfy a test of fairness or proportionality. As such, the judgment is consistent with a social democrat reading of P1-1.

Three years later, in *Sporrong*, the Court stated that an interference with property would comply with P1-1 only if 'a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.<sup>53</sup> This represents a radical shift in thinking: from reviewing only the lawfulness and the purpose of legislation, the Court would now review the fairness of the legislation.<sup>54</sup> On its face, *Sporrong* was not about expropriation, but the issue of permits authorizing expropriation that were not acted upon by the Swedish authorities. These permits did not prevent the rental or sale of the property, but they did have the effect of depressing the market price for the property. The applicants' case focused on the length of time that the permits were left outstanding: permits were issued for five years in the first instance, but were often renewed, without any real opportunity for challenge. The Court held that the length of time that permits remained in force without an actual expropriation upset the fair balance. In a key passage, it stated that Sweden could have maintained fairness by compensating for the delays in the process.<sup>55</sup> This opened the door to a more general compensation requirement. Soon after, in *James and Lithgow*, the Court confirmed the importance of the fair balance, and applied it to deprivations of property under the second sentence of P1-1. Following *Sporrong*, it stated that 'compensation terms are material to the

<sup>50</sup> *Handyside v United Kingdom* (App No 5493/72) (1976) Series A No 24.

<sup>51</sup> *ibid* [62].

<sup>52</sup> In addition, that the confiscation was not discriminatory; the applicant maintained that art 14 discrimination was involved, on the basis of his political views [65]–[66].

<sup>53</sup> *Sporrong* (n 2) [69].

<sup>54</sup> Arguably, *Marckx v Belgium* (App No 6833/74) (1977) Series A No 31 [63] foreshadowed *Sporrong*, as the Court declared that the 'peaceful enjoyment of possessions' did not apply solely to the enjoyment of possessions, but it expressed a general right of property, and therefore protected all rights associated with property. Hence, 'the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property'. In doing so, it applied the classic liberal conception of ownership as full dominion over the object of property.

<sup>55</sup> *ibid* [73].

assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions.<sup>56</sup> Accordingly, the 'taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable'.<sup>57</sup>

Before considering the subsequent development of principles of compensation, it is worth reflecting on the impact of *Sporrong*. Plainly, it re-aligned the liberal-social democrat balance of P1-1. The adoption of the fair balance test favoured the liberal model of the right to property, not only because it enhanced the protection of property, but because the image of the balance treats State action as a threat to the individual. Indirectly, the Court's judgment also places full weight on the market as the measure of individual entitlement. As the Commission noted, the expropriation permits were issued at the inception of the development, and, in some cases, before the decisions on the use of specific property or the character of the development, for a specific reason: to freeze the amount of compensation that would be paid on expropriation.<sup>58</sup> This would ensure that, as development proceeded, those who were expropriated toward the end of the project could not claim compensation for the enhancement of value to their property arising from the development. The scheme therefore reflected a central element of the post-War social democrat views on the sharing of the benefits of re-development: the increase in the value of land that was attributable to public investment should accrue to the public, rather than individual property owners. Indeed, the Town and Country Planning Act 1947 pursued the same purpose, but by basing compensation on the existing use value.<sup>59</sup> This fundamental aspect of the legislative and practical context was not even mentioned by Court. The judgment therefore casts doubt on the social democrat views of property and value in the regulatory State.

But why did the Court in *Sporrong* make this shift?<sup>60</sup> In its judgment, it said only that the principle of the fair balance 'is inherent in the whole of the Convention and is also reflected in the structure of article 1 (P1-1)'.<sup>61</sup> In an earlier passage, it put forward the now-familiar statement on the three rules of P1-1:

The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.<sup>62</sup>

<sup>56</sup> *James* (n 1) [54]; *Lithgow* (n 1) [120].

<sup>57</sup> *James* *ibid*; *Lithgow* *ibid* [121].

<sup>58</sup> *Sporrong and Lönnroth v Sweden* (App No 7151/75; 7152/75) (1980) [123] (EComHR).

<sup>59</sup> See also the recommendations of the Irish Committee on the Price of Building Land, discussed above, text accompanying (n 36).

<sup>60</sup> In *Sporrong* (n 2) [69], after stating the fair balance principle, the Court stated that the 'Agent of the Government recognised the need for such a balance.' However, the Court went on to say that 'At the hearing on the morning of 23 February 1982, he pointed out that, under the Expropriation Act, an expropriation permit must not be issued if the public purpose in question can be achieved in a different way; when this is being assessed, full weight must be given both to the interests of the individual and to the public interest.' This falls far short of a general concession that the fair balance must apply in every case, especially in respect of substantive elements.

<sup>61</sup> *ibid* [69].

<sup>62</sup> *ibid* [61].

The Commission had treated the case as a control on the use of property, under the third ‘rule’ of P1-1. In *Handyside*, the Court also classified the confiscation of the property as a control on use. However, in *Sporrong*, the Court treated the permits and the restrictions as separate matters. The odd aspect of this approach is that the permits did not have any direct effect on property rights. They simply made the property less marketable and less valuable as security. But, since they had no direct impact, the Court held that were not ‘controls on the use of property’, and the third sentence did not apply. Hence, the Court was able to avoid dealing with the *Handyside* judgment.

The Court also decided that the permits did not amount to a deprivation of property, under the second sentence. It might then have been thought that the permits did not amount to an interference with property at all, as they did not restrict any of the rights of property: the owners could still occupy, rent, sell or otherwise dispose of the property. However, the Court treated the permits as interfering with the enjoyment of possessions. In effect, it extended P1-1 to protect property from both direct and indirect interference with rights of property. In any case, the *Handyside* principle would seem applicable: if States were the sole judge of the necessity of laws that had a direct impact on the use of property, surely they were also the sole judges of the necessity of laws that had an indirect impact on the use of property. However, the Court did not even mention *Handyside* in its judgment.<sup>63</sup> Instead, the Court introduced the fair balance principle to P1-1.

The reasoning therefore does not get us any closer to the Court’s reasons for moving to the liberal model of P1-1. The majority in *Sporrong* certainly did not claim that its judgment was an example of evolutive or dynamic interpretation. Indeed, it would have been a difficult case to make: there was no emerging consensus that social democracy no longer represented legitimate political views on property and regulation. Instead, the Court refers only to the text of P1-1 and the Convention as a whole. In other words, the Court reads P1-1 as though it had always been intended to incorporate the fair balance test. Similar thinking is evident in *James* and *Lithgow*, where, as explained above, the Court stated that the right to property in P1-1 would be ‘largely illusory and ineffective in the absence of a principle requiring compensation in all but exceptional circumstances.’<sup>64</sup> Whether protection would be illusory or ineffective depends, of course, on the purpose of the right to property. If one assumes that P1-1 is a liberal right, then plainly some form of compensation guarantee based on market values would be needed; if it reflects social democrat values, it does not.

In fairness, however, it must be noted that *James* and *Lithgow* may be read as an effort to limit the reach of *Sporrong*. To begin with, the Court did not find that the fair balance was upset in either case. In both *James* and *Lithgow*, the Court made it clear that States have a wide margin of appreciation in determining whether a deprivation of possessions is in the public interest and, equally important, in determining the method of valuing property.<sup>65</sup> This affirms the social democrat emphasis on ensuring that legislatures have the power to pursue ambitious social and economic programmes. Moreover, in both cases it stated that ‘Legitimate objectives of “public interest”, such as pursued in measures of economic reform or measures designed to achieve greater

<sup>63</sup> There were references to *Marckx*, but only in connection with the meaning of ‘possessions’ (ibid [57]) and actual loss (ibid [73]).

<sup>64</sup> *James* (n 1) [54]; *Lithgow* (n 1) [120].

<sup>65</sup> *James*, ibid; *Lithgow*, ibid [122].

social justice, may call for less than reimbursement of the full market value.<sup>66</sup> This gives some scope for the social democrat principle that the State must have some room to consider social obligations associated with ownership in determining an appropriate compensation level. Indeed, the Court may have taken some inspiration from the Italian and German constitutional jurisprudence. As explained above, both provide a limited substantive guarantee: some compensation may be required for expropriation, but in neither jurisdiction does the constitution guarantee full compensation. This may have suggested to the Court that it would be possible to construct a limited compensation guarantee without compromising the social democrat element of P1-1.<sup>67</sup>

#### IV. SOCIAL DEMOCRACY AND DEPARTURES FROM MARKET VALUE COMPENSATION

The next question is, of course: what circumstances justify a departure? And, in particular, how far does the Court's jurisprudence acknowledge the social democrat aspect of P1-1? 'Economic restructuring' and 'social justice' are the two examples given in *Lithgow* and *James*, but how would they apply?

##### A. Economic Restructuring

Economic restructuring could include several possibilities. The first relates to the cost of a project. Can the State justify a departure from the usual standard because the project is important and yet it would be unaffordable at full compensation? This is, plainly, a difficult argument to make in any specific circumstances, as the State could increase taxes to produce the funds to compensate. Indeed, as Justice Scalia argued in *Pennell v San Jose*, full compensation would improve democratic governance by forcing legislators to present taxpayers with the full cost of projected programmes.<sup>68</sup> Nevertheless, there may be situations in which the State would claim that raising taxes would have harmful economic consequences that would outweigh the cost of abandoning the project. However, it is clear from *Scordino v Italy*<sup>69</sup> that the Court is very reluctant to entertain such an argument, at least where it is based on general financial conditions. In this case, the relevant law authorized expropriation with compensation at about half of the market value. There was nothing particularly compelling about the specific use of the property: the law applied to expropriations over a specified period for a number of different purposes. The Italian government argued that the compensation provisions of the law had been an urgent and temporary measure to aid in the stabilization of public finances during a period of considerable uncertainty.<sup>70</sup> It also claimed that the law 'reflected a "community spirit" and the "current political desire" to establish a system going beyond traditional nineteenth-century liberalism', and

<sup>66</sup> *James*, *ibid*; *Lithgow*, *ibid* [121].

<sup>67</sup> *James*, *ibid*; *Lithgow*, *ibid* [120]: 'the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes.' The Court does not explain why this is relevant, or even explain whether it is referring to a general practice or a justiciable constitutional principle: see generally Allen (n 8) 301–302.

<sup>68</sup> *Pennell* (n 11) and accompanying text.

<sup>69</sup> *Scordino v Italy* (App No 36813/97) ECHR 2006-V.

<sup>70</sup> *ibid* [60].



referred to the case law discussed above on compensation as ‘serious relief’.<sup>71</sup> The Italian law certainly did go beyond liberalism, but the Court of Human Rights held that compensation should have been at the market value.<sup>72</sup> More generally, the Court of Human Rights made it clear that departures from market value can only be justified by reference to the purpose of the specific scheme or circumstances of the property owner.<sup>73</sup> In other words, general financial conditions do not provide sufficient justification to depart from market value compensation.

This casts some doubt on the scope of the *Lithgow* exception. In *Scordino*, the Italian government did not suggest that the purpose of the expropriation had anything to do with economic restructuring, but only with a short term crisis in public finances. Even in *Lithgow*, it is not clear that the exception applied to the facts. In *Lithgow*, which concerned the nationalization of the aircraft and shipbuilding industries, the shareholders claimed that, although the legislation promised full value for their shares, the means of valuing their shares produced far less than full value. The Court denied their claims, citing both the breadth of the margin of appreciation and the exception for economic restructuring.<sup>74</sup> Arguably, the Court might have relied only on the margin of appreciation: the United Kingdom was required to pay full compensation, and had a very wide discretion to determine how to value the property.<sup>75</sup>

The recent litigation involving the Northern Rock bank provides another prominent example of this approach.<sup>76</sup> The United Kingdom nationalized the Northern Rock when it became unable to meet its obligations and could not find a suitable private sector buyer, and a complete collapse would have caused severe damage to the economy. The statutory order authorizing the nationalization stated that compensation payable to a shareholder would be ‘an amount equal to the value immediately before the transfer time’ of the shares.<sup>77</sup> However, the legislation and order instructed the valuer to assume that, immediately before the transfer, (i) the Northern Rock would not receive exceptional support from the Bank of England or the Treasury, (ii) it was not a going concern and (iii), it was in administration and would be wound up. Not surprisingly, the valuer eventually concluded that the bank had no value before the nationalization.

A group of shareholders challenged the valuation assumptions before the Court of Appeal. In broad terms, their argument was similar to that of the shareholders in *Lithgow*: legislation promised the value of the shares, but the valuation assumptions effectively denied any real prospect of full value (or, in the Northern Rock case, any value at all).

<sup>71</sup> *ibid* [90]; see text accompanying (n 33) and (n 34).

<sup>72</sup> *ibid* [257].

<sup>73</sup> *ibid* [102], [132].

<sup>74</sup> M Mendelson ‘The United Kingdom Nationalization Cases and the European Convention on Human Rights’ (1986) 57 BYIL 33.

<sup>75</sup> Compare the French Conseil d’État’s decisions regarding similar issues over the valuation of shares in nationalised industries in the early 1980s, as discussed in MH Mendelson ‘International Law and the Valuation of Nationalised Shares: Two French Decisions’ (1985) 34 ICLQ 284.

<sup>76</sup> *R (on the application of SRM Global Master Fund LP) v Treasury Commissioner* [2009] EWCA Civ 788; NJ Calamita, ‘The British Bank Nationalizations: An International Law Perspective’ (2009) 58 ICLQ 119.

<sup>77</sup> Banking (Special Provisions) Act 2008, s 5(4); Northern Rock plc Compensation Scheme Order 2008, para 3(2) and 6.



The Court of Appeal dismissed the claim. As in *Lithgow*, the nationalization could have been treated as an example of economic restructuring, which could justify below-market compensation. However, the Court of Appeal decided that the assumptions fell within the United Kingdom's margin of appreciation. Given the breadth of the margin, it could not be said that the shareholders did not receive an amount 'reasonably related' to the value of their shares. Ultimately, the *Lithgow* exception for economic restructuring has not been closely tested, even in *Lithgow* itself.

### B. Social Justice

The exception for social justice has attracted more attention. The issue arose in *James*, because it concerned below-market expropriation of the freeholds of property. Under the Leasehold Reform Act 1967,<sup>78</sup> tenants under long term residential leases were given the right to buy the freehold, at a price that could exclude the value of the buildings. The United Kingdom argued that the tenants should not be required to pay for the building, because the typical long lease required the tenant to maintain the property. Over the period of a long lease, the cost of maintenance would equal or exceed the cost of constructing from new. Hence, the government claimed that the typical tenant would have already paid for the building, and the owner had no moral claim to be compensated for something it had not paid for.<sup>79</sup> In that sense, the legislation reflected the idea of social obligation that was part of the Italian and German constitutional systems, which incorporate the idea that ownership includes social obligations that may, in some situations, warrant something less than market value compensation. The Court accepted the United Kingdom's argument, which suggests that P1-1 was broad enough to accommodate the social democrat view of property and social obligation. Accordingly, it stated that the needs of social justice would allow departures from full market compensation in exceptional circumstances.<sup>80</sup>

The issue has been raised in a number of cases on transitional justice. In some States, post-communist reform involved the expropriation of land for something less than full compensation. The justification lies in the manner of acquisition during the pre-transition era, especially where there is a feeling that the acquisition of title was tainted by some form of participation or complicity with the former regime. In such cases, the State may argue that there is a public interest in ensuring that morally questionable titles should not be entitled to full compensation, or possibly to any compensation.<sup>81</sup> As such, these cases are more about transitional justice than social justice. In other words, the focus is on the correction of past wrongs rather than the present or future distribution of the basic goods needed for a meaningful life. Hence, these cases do not necessarily raise the differences in the liberal and social democrat

<sup>78</sup> As amended by the Housing Act 1969, the Housing Act 1974, the Leasehold Reform Act 1979, the Housing Act 1980 and the Housing and Building Control Act 1984.

<sup>79</sup> *James* (n 1) [57].

<sup>80</sup> *Lithgow* (n 1) [121]; cf *Broniowski v Poland* (App No 31443/96) ECHR 2004-V 1 (GC), about the unconstitutional cancellation of claims to be given property. The scale of the problem justified cancellation at less than the face value of the claims.

<sup>81</sup> See T Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' (2006/7) 13 *Columbia JEL* 1, 29–44.

views of property and human rights. Nevertheless, cases are often framed in terms of social justice, probably because of the open acknowledgement of the importance of social justice in *James*, and because the distinctions between transitional and social justice are not clear-cut. It may be the case, for example, that a communist administration produced a distribution of property and resources that the present government regards as socially unjust. The effect is that some of the transitional justice cases have had an important impact on the place of social democracy within P1-1.

These issues were comprehensively reviewed by the Grand Chamber in the seminal case *Jahn v Germany*,<sup>82</sup> with an equivocal outcome. The applicants had held land in the former German Democratic Republic, but under the laws in force at the time, they should have restored that land to a pool of State-owned land as they did not occupy it for their own use. They did not do so and, due to administrative lapses, they were not required to do so; however, many others in the same situation did restore the land. During the late stages of the regime, legislation was enacted that had the unintended effect of recognizing those who had not obeyed the law as the titled owners of the land. This produced an awkward result: those who had obeyed the law were left with nothing, whereas those who had evaded the law were now fully entitled to the land. After re-unification, Germany sought to reverse the legislation, on the basis that it would be inequitable to those who had obeyed the law. Hence, the applicants, and those in a similar position, would be expropriated without compensation.

The Constitutional Court noted that its case law distinguishes between an expropriation under article 14(3) and a delineation of the scope of property under article 14(1). This was not an expropriation, but the acquisition was not for a public good, in the sense that the land was not acquired for use in a State-sponsored project. Instead, the law was intended to secure justice across a distinct class. Hence, there was no constitutional guarantee of compensation. Nevertheless, under article 14(1), it is still necessary to 'strike a fair balance and proportionate relationship between the legitimate interests of the persons concerned.'<sup>83</sup> This should take into account 'both the legal position of the owner and the requirements of the system of socially fair ownership under article 14 § 2 of the Basic Law.' The requirement for socially fair ownership meant that it was legitimate to enact legislation to plug the 'hidden loophole' in the law that had enabled the applicants to acquire title. Moreover, the impact on the applicants was not disproportionate: given the circumstances, and in particular the disparity in treatment with those who had obeyed the law under the GDR, they could not have expected the legislature to leave their titles untouched.

The Court of Human Rights initially took a very different view of the case. The case was first heard by the Third Section of the Court, which held that compensation could not be denied on the basis of the manner in which they had acquired the property:

The Court cannot ... agree with the Government's reasoning in the instant case regarding the concept of 'illegitimate' ownership, which is an eminently political concept ... [R]egardless of the applicants' situation before the entry into force of the

<sup>82</sup> *Jahn v Germany* (App No 46720/99; 72203/01; 72552/01) ECHR 2005-VI (GC); U Deutsch, 'Expropriation without Compensation—The European Court of Human Rights Sanctions German Legislation Expropriating the Heirs of 'New Farmers'' (2005) 6 German LJ 1367.

<sup>83</sup> Federal Constitutional Court, Judgment of 6 October 2000, 1 BvR 1637/99; passages in the text are from the ECHR translation, *ibid* [42].

Modrow Law, there is no doubt that they legally acquired full ownership of their land when that Law came into force.<sup>84</sup>

The Third Section did not explain what it meant by an ‘eminently political concept’ of title. The judgment does refer to the principle that departures from full market compensation may be permitted and, ‘in exceptional circumstances’, the State need not provide any compensation.<sup>85</sup> However, the passage quoted above seems to undermine that principle. At the very least, it undermines the Basic Law’s position that a system of ‘socially fair ownership’ may have required the adjustment of titles, as well as the *James* principle that the pursuit of social justice may take into account the moral entitlement of the owner to compensation.<sup>86</sup>

Germany appealed to the Grand Chamber, which held that there was no violation. The Grand Chamber’s reasoning was very similar to that of the Constitutional Court. The applicants had no moral expectation of compensation, as they had benefited from a windfall as a result of the administrative and legislative failings of the former GDR. The purpose of ensuring equitable treatment amongst all similarly placed individuals was a legitimate purpose,<sup>87</sup> and in any case, the applicants had no settled expectation that their titles would not be removed, as the re-unification of Germany was ‘inevitably marked by upheavals and uncertainties’ and the specific issues concerning their claims were well-known. The Grand Chamber specifically referred to the *James* principle, and described this case as one where the pursuit of social justice justifies a departure from full compensation. Hence, although the case was not truly about social democrat policies, it appears to affirm that P1-1 accommodates a social democrat outlook on property.

It must be noted, however, that the judgment is not unanimous, and other transitional justice cases suggest that the Court’s views on social justice are narrowing.<sup>88</sup> This is clearly evident in *Urbárska v Slovakia*.<sup>89</sup> Under the communist regime, the owners of agricultural land were required to put it at the disposal of State-owned or co-operative farms. Some of this land was later made freely available to groups of allotment gardeners. In many cases, the owners retained title, although clearly their titles had very little actual value without access or use of the land. Post-communist legislation restored some rights to owners, but subject to restrictions on their power to evict tenants and very tight controls on rent. The owners were also required to transfer title to the tenants on request. The State would provide compensation, in the form of substitute land or money. The applicants claimed that the compensation should be based on present market values, including the current development potential of the land.<sup>90</sup> However, the government felt that this would confer an unearned benefit on the owners, as the current value was largely down to the improvements made by the gardeners and public investment in the surrounding areas. Accordingly, replacement land would

<sup>84</sup> *Jahn v Germany* (App No 46720/99; 72203/01; 72552/01) (2004) (Third Section) [90].

<sup>85</sup> *ibid* [82].

<sup>86</sup> In fairness, however, the Court did not say that the fair balance required *full* compensation on these facts, but only that the applicants should have been ‘adequately’ compensated.’ *ibid* [91] (emphasis added).

<sup>87</sup> *Jahn* (n 82) (GC) [116].  
<sup>88</sup> There was a significant dissenting group in the Grand Chamber, and the Third Section judges were 7–0 in favour of the applicants. As the Grand Chamber went 11–6 against the applicants, and two of the judges sat on both judgments, the split was 11–11.

<sup>89</sup> *Urbárska Obec Trenčianske Biskupice v Slovakia* (App No 74258/01) (2007).

<sup>90</sup> *ibid* [52] and [102].

be comparable in quality to the land as it stood before the owners had put it at the disposal of the State or cooperative farms. Monetary compensation was also based on the value at that time.

The issues were therefore very similar to those of *James*: do property owners have a human right to compensation for elements of the property's value that are not attributable to them? The Slovakian Constitutional Court answered in the negative and upheld the legislation. However, the Court of Human Rights decided that there was a violation of P1-1. It said that there should be a 'direct link' between the public interest supporting departure and the level of compensation: 'A sliding scale should be applied in this respect, balancing the scope and degree of importance of the public interest against the nature and amount of compensation provided to the persons concerned.'<sup>91</sup> This does not add anything to the *James* principles, as it is implicit in the idea of balancing. However, the Court later stated that 'There is no indication that, in general, persons using land in allotment gardens belong to a socially weak or particularly vulnerable part of the population.'<sup>92</sup> This was not alleged by the Slovak government. Indeed, it was not part of the United Kingdom's case in *James*, or even in *Jahn v Germany*. Instead, the argument concentrated on the moral expectations of the owners: they had not created the value for which they sought compensation, and that should be enough to deny that they had a human right to that compensation. Plainly, protection of the socially weak and vulnerable is part of a social democrat agenda, but it does not represent its full extent.

Like *Jahn*, *Urbárska* is factually as much about transitional justice as social justice or social democracy. However, a key assumption is evident in both cases—especially *Urbárska*—that undermines social democracy. That is, the Court assumes that transitional justice is itself transitional: in other words, States are allowed some margin to adjust entitlements in a transitional period, but the transition ends at some point.<sup>93</sup> The crucial point is that transition must culminate with a free and unregulated market economy.

The movement away from social democracy is also evident in recent cases on rent controls. Housing, tenancy rights and controls over rent and security of tenure were important elements of post-War social policy in many European States. As written, P1-1 appears to give States a wide discretion in the area, as the third sentence preserves the 'the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'. As explained above, in *Handyside*, the Court was clear that States were the sole judges of the necessity of controls on the use of property, and the Court's role was limited to supervision of the lawfulness and the purpose of the restriction in question.<sup>94</sup>

The *Sporrong* judgment therefore subjected regulatory policies to closer human rights scrutiny, especially as it shifted P1-1 to the liberal view that an unregulated market is the normal state of affairs, from which all departures require justification. Nevertheless, in the leading early case of *Mellacher v Austria*,<sup>95</sup> the Court indicated that rent controls would only violate P1-1 in very exceptional circumstances. In this case, the tenancy laws and rent controls severely restricted the capacity of the applicant

<sup>91</sup> *ibid* [126].

<sup>92</sup> *ibid* [131].

<sup>93</sup> See also M Vartu, 'Transition as a Concept of European Human Rights Law' (2009) 2 EHRLR 2009.

<sup>94</sup> *Handyside* (n 50) [62].

<sup>95</sup> *Mellacher v Austria* (App No 10522/83; 11011/84; 11070/84) (1989) Series A No 169.

landlords to earn a profit. Indeed, they claimed that the rents they were permitted to charge were not even sufficient to cover the costs of maintaining their properties.<sup>96</sup> As the dissenting judges put it, 'The applicants do not seem to be far wrong when they say that the reduced [monthly] rent now corresponds to the price of a simple meal for two persons in a cheap restaurant.'<sup>97</sup> However, the majority held that the impact did not upset the fair balance, especially as the controls were intended to further social justice.<sup>98</sup>

A series of cases following *Mellacher* confirmed that regulations may have a severe impact on the value and profitability of property, without violating P1-1.<sup>99</sup> However, in recent years, the Court has become less willing to allow regulation to stand in cases involving social justice. Initially, these cases arose in countries in transition from communism. They are similar to *Urbárska*, as they involve the restoration of a degree of control to owners who were effectively dispossessed during the communist era. Unlike *Urbárska*, the primary focus fell on the severity of the controls on rent, maintenance and eviction.

The leading case is *Hutten-Czapska v Poland*,<sup>100</sup> in which the Court considered Polish laws that had the effect of keeping rents well below the costs of maintenance. On its face, the situation resembled that in *Mellacher*, although the complexity of the schemes in each case makes direct comparison difficult. In *Hutten-Czapska*, the Court found that P1-1 had been violated. On one reading, the Court challenged the social democrat philosophy of property and social obligations, as it stated that P1-1 provides landlords with an 'entitlement to derive profit from their property'. Not only is there an implied right to compensation, but now it seems that there is an implied right to earn a profit.<sup>101</sup> However, it should be noted that the Court did not explain what it meant by 'profit'. Is it the potential for earning revenue? Or for earning revenue in excess of ongoing costs? Or for earning a rate of return on investment comparable to other investments? Or does some other standard apply?

It could be argued that *Hutten-Czapska* is not primarily about substantive fairness, but about the separation of powers and the administration of justice. Beginning in 2000, the Polish Constitutional Court was locked in a battle with the legislature over the constitutionality of rent and tenancy laws. The Court would declare legislation unconstitutional, only for the legislature to make minor amendments that would come back before the Court, which would then declare that the amended legislation was still unconstitutional. Arguably, the Grand Chamber was more concerned with the relationship between the Polish court and the legislature than it was with the detail of the rent control laws. The Court has dealt with many cases where administrative failings are a basis for finding a violation of P1-1; in such cases, it is not the substantive basis of

<sup>96</sup> It is not entirely clear whether the Court accepted this description: *ibid* [55]–[56].

<sup>97</sup> *ibid* (joint dissenting opinion of Judges Cremona, Bindschedler-Robert, Gölçüklü, Bernhardt and Spielmann).

<sup>98</sup> This even applied in cases where tenants were entitled to a judicial modification of a contract that they had apparently entered into without reservation: *ibid* [56].

<sup>99</sup> T Allen, *Property and the Human Rights Act 1998* (Hart, Oxford, 2005) 152–153.

<sup>100</sup> *Hutten-Czapska v Poland* (App No 35014/97) ECHR 2006-VIII.

<sup>101</sup> The judgment does not indicate whether the property was without value, or even without considerable value. Plainly, it would have been worth more without the rent controls, but in countries that regulate land use (ie virtually all European states), land is worth more in the absence of regulation.

the law that is important, but the failure to apply the law in any effective manner.<sup>102</sup> Indeed, most of Grand Chamber's judgment in *Hutten-Czapska* simply echoes the reasoning and conclusions of the most recent judgment of the Constitutional Court. As such, the Grand Chamber gave a clear message to the Polish legislature and government that they could not ignore or avoid the judgments of the Constitutional Court.

If the Grand Chamber's real concern was with the separation of powers and the administration of justice, the judgment would have been consistent with both liberal and social democrat ideals.<sup>103</sup> However, it was the scrutiny of social justice legislation that has been picked up in subsequent judgments. In *Radovici and Stănescu v Romania*,<sup>104</sup> shortcomings in legislative drafting and the administration of the law left some landlords unable to evict tenants or even to charge rent for a number of years. Factually, the case falls into the category of cases primarily concerned with the administration of law rather than its substance, and could have been decided on that basis. However, the Court framed its reasoning in terms of the limits of social justice:

The Court accepts that the Romanian State inherited from the communist regime an acute shortage of housing available for rent at an affordable level and, as a result, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. It had, on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter. Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. *This burden cannot, as in the present cases, be placed on one particular social group, however important the interests of the other group or the community as a whole...*<sup>105</sup>

The final sentence suggests that the Court was not primarily concerned with the rule of law or administration of justice, but about regulation and distributive justice. Indeed, the suggestion that distributive justice cannot be accomplished through regulation reflects the liberal mistrust of social planning and redistribution by legislation. The logic of *Urbárska* and *Radovici* would defeat redistribution: *Urbárska* suggests the only form of social justice is that which seeks to protect the weak, and *Radovici* that the protection of the weak cannot be furthered by the modification of property rights of owners.

It is especially significant that the reasoning of *Hutten-Czapska* and *Radovici* has also crept into cases that do not deal with transitional justice or administrative failings. In a series of cases from Malta, the Court has declared that legislation that kept rents

<sup>102</sup> T Allen, *Property and the Human Rights Act 1998* (Hart, Oxford, 2005) 159–161.

<sup>103</sup> However, if that was its primary objective, the effect on the jurisprudence of P1-1 is unfortunate, because it ignores the context of Polish constitutional law. That is, the Polish Constitution guarantees housing and tenancy rights; as it also guarantees property, these rights must be balanced against each other. Under the Convention, art 8 provides a right to respect for the home, and hence it is applicable to evictions; however, it does not provide a positive claim against the State to be provided with a home. The Constitutional Court's judgment raises the importance of the constitutional rights of tenants; by contrast, the Grand Chamber's judgment does not mention art 8. It acknowledges that there is a community interest in protecting tenants, but that puts tenants in a weaker position than they would be under the Polish Constitution.

<sup>104</sup> *Radovici and Stănescu v Romania* (App No 68479/01, 71351/01 and 71352/01) (2006).

<sup>105</sup> *ibid* [88] (emphasis added).

well below the market rate violated P1-1.<sup>106</sup> Unlike *Hutten-Czapska* and *Radovici*, it appeared that gross rental income did exceed the running costs in these cases. Moreover, unlike *Hutten-Czapska*, the legislation was enacted as a long term structural policy, sustained by different governments over a lengthy period. In some respects, its effects were similar to those of planning laws. In the United Kingdom, for example, agricultural land is worth far less than residential land, and yet there is no suggestion that a refusal of a request for a change of use would breach P1-1 simply because it denies more profitable uses to the property owner. Nevertheless, in the Maltese cases, the Court picked up the language from the transitional cases, as it referred to an owner's 'entitlement to derive profits' from their property, and even a 'right to receive a market rent'.<sup>107</sup> The Court also queried the use of regulation as a form of distributive justice and, in particular, the human rights implications of imposing an obligation on a property owner to provide accommodation at something less than a full market rate.

### C. Value and Social Obligation

There is a further element of the social democrat view of the value and compensation that deserves examination. It is the idea that the value of property is at least partly produced by social or community action. This may be directly related to the specific asset: for example, public investment in infrastructure may raise the value of a specific plot of land. If so, the social democrat may argue that the owner has no human right to compensation for value created by that investment. Indeed, this was one of the reasons given by Slovakia for denying full compensation in *Urbárska*. Or, there may be other values associated with the property that may be regarded as public rather than private, even though title is held privately. For example, land may have special meaning to the community as a site of religious, scientific, environmental or historic interest. It may be the case that the very aspect of community interest also increases the market value of the land. The issue is whether compensation must be paid for the market value, or whether the value associated with these specific attributes may be excluded.

A social democrat construction of P1-1 would regard these values as socially constituted, and hence there would be no human right to expect compensation for 'public' values. In other words, the community, acting through the legislature, could legitimately take the view that certain attributes of specific types of property should not be valued for compensation. In some cases, this is uncontroversial for both liberals and social democrats. For example, the valuation of property would normally exclude its value in an illegal use, because an ownership interest does not include a right to use the property illegally. Social democrats go further, as they maintain that property is subject to social obligations that go beyond illegality, and these obligations may reduce the value of property that is recognized on expropriation. It allows the State some leeway to define those values, and hence to pay something less than full compensation on expropriation. It seems, however, that the Court is very reluctant to allow this in

<sup>106</sup> *Ghigo v Malta* (App No 31122/05) (2006); *Fleri Soler and Camilleri v Malta* (App No 35349/05) (2006); *Edwards v Malta* (App No 17647/04) (2006); *Amato Gauci v Malta* (App No 47045/06) (2009); cf *Zammit and Others v Malta* (App No 16756/90) (1989) 68 DR 312.

<sup>107</sup> *Ghigo* *ibid* [49], [66]; *Fleri Soler* *ibid* [74], [78]; *Edwards* *ibid* [75], [78] *Amato Gauci* *ibid* [63].



practice, as shown by the Grand Chamber judgment in *Kozacioğlu v Turkey*.<sup>108</sup> This case concerned the amount of compensation payable on the expropriation of a building that had been designated as a 'cultural asset' under heritage legislation. Under the relevant Turkish law, compensation was based on the market value of the land and the cost of constructing a replacement building of similar design and size. On its face, the Turkish principles should leave the owner no worse off. However, in the case of designated buildings, there were two further points that complicated matters.

The first was depreciation. New buildings would be worth more than older (designated) buildings, because maintenance would be cheaper. Accordingly, depreciation applied to valuation. In this case, it was 50 per cent of the cost of reconstruction.<sup>109</sup> The second concerned the building's architectural and historical features, as Turkish law specifically excluded these features from the valuation.<sup>110</sup> Heritage belonged to the nation, and hence the nation was not required to compensate for it on expropriation. The market price might well reflect the desirability of a heritage building, but that would not be available on expropriation.

The case therefore neatly raises the tension between the liberal and social democrat visions of the right to property. The liberal model would hold that the owner is entitled to the price obtainable on the market. The State cannot declare that some feature of the property 'belongs' to it. A social democrat would argue that the legislature has an important role in determining the value of property, and that the legislature may decide that the public interest demands that some values that are realisable in a private transaction are not compensatable on expropriation. The Court appeared to accept this argument, as it declared that the protection of historical and cultural heritage is a legitimate objective of public interest that 'may call for less than reimbursement of the full market value'.<sup>111</sup> However, it did so without explaining *why* the protection of heritage would justify a departure from the ordinary rule, and it then ignored the principle in the rest of the judgment. It found the compensation principles did not strike a fair balance, on the basis that, if depreciation was taken into account, so should the special features of the property that were associated with depreciation: 'not only is such a system likely to penalize those owners of listed buildings who assume burdensome maintenance costs, it deprives them of any value that might arise from the specific features of their property.'<sup>112</sup> Compensation should have, 'to a reasonable degree', taken the property's 'specific features' into account.

The difficulty with this reasoning is that it merely summarizes the effect of the Turkish legislation, without offering any analysis. Indeed, it does not even recognize the central issue, as the legislature deprived owners of the heritage value *because* it felt

<sup>108</sup> *Kozacioğlu v Turkey* (App No 2334/03) (2009).

<sup>109</sup> Taken alone, the depreciation rules might have been challenged: see *Katkaridis v Greece* (App No 19385/92) ECHR 1996-V 1673; *Tsomtsos and Others v Greece* (App No 20680/92) ECHR 1996-V 1699; *Papachelas v Greece* (App No 31423/96) ECHR 1999-II 1.

<sup>110</sup> In this case, however, the owner managed to get the valuers to indicate the value of the special features. It was not clear just how they managed to do so. Turkish law was very clear these features were not relevant, and yet the Turkish valuation panel explicitly took them into account. In any case, the Turkish Court of Cassation reviewed the case and refused to allow the re-adjustment for historic value. The final amount of compensation was the depreciated amount.

<sup>111</sup> *Kozacioğlu* (n 108) [64].

<sup>112</sup> *ibid* [70].



that the value belonged to the nation. In a dissenting opinion, Judge Maruste addresses the point directly:

the applicant himself did not create the asset's extra value—he simply took proper care of it, as every responsible and good citizen would. Thus, the specific status of a cultural asset was accorded to the property by the State in the general (and not commercial) interest.

This statement is entirely consistent with the social democrat view of property. If heritage value is public, it is legitimate for a State to refuse to compensate for it, and there would have been nothing intrinsically wrong with the system of valuation in *Kozacioğlu* (subject to a possible challenge to the rigidity of the depreciation rules).

At a deeper level, the real issue is, once again, the relevance of the social democrat model of the right to property. The judgment confirms the Court's faith in the market: individuals acting through private economic processes, rather than public political processes, exclusively determine the substantive content of human rights. Perhaps there are sound reasons for this, but at no level does the Court seek to explain what they are.

#### V. CONCLUSION

The right to property is one of the most frequently litigated Convention rights. The volume of litigation is at least partly due to the adoption of the fair balance principle in *Sporrong*, as affirmed in a multitude of subsequent cases. Plainly, it is too late for the Court to revisit *Sporrong*, and it has never indicated any interest in doing so. However, the result is that P1-1 has been given shape in a way that was never intended. Of course, the Court does not restrict itself to an originalist interpretation, and only rarely makes reference to the *travaux préparatoires*. Nevertheless, we have never had a close examination by the Court of the purpose and nature of P1-1, except for the hollow assertions that a right to property would be 'largely illusory and ineffective' without a compensation guarantee, or that property owners have 'an 'entitlement to derive profit from their property', or that the market necessarily directs the content of human rights. These statements represent profoundly important political choices, and yet the Court has made these choices without any apparent recognition of their significance. Even if property is essential to individual dignity and autonomy in the same way as rights to life, security of the person, freedom of expression, and therefore that it is equally deserving of protection as other Convention rights, it also has characteristics of the social and economic rights to the basic needs such as a decent housing, a safe environment, reasonable health care and education. It is these characteristics that are being ignored by the Court in its revival of a liberal theory of property.

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